VIRGINIA LAW REGISTER.

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MISCELLANEOUS NOTES.

THE COURT OF APPEALS, adjourning at Richmond on the 29th of April, will reconvene at Wytheville on the 10th of June. The session there may continue at least sixty days, if the business be not sooner dispatched. The statute requires the docket to be arranged according to circuits. The number of cases on the docket at the June session thus arranged, to be called in the order named, is as follows:

Commonwealth's Cases	1
Seventeenth Circuit, Judge Miller	24
Fourteenth Circuit, Judge Blair	19
Corporation Court of Radford City, Judge Cassell	7
Corporation Court of Roanoke City, Judge Wood	32
Fourth Circuit, Judge Whittle	1
Eighteenth Circuit, Judge Dupuy	9
Sixteenth Circuit, Judge Sheffey	8
Corporation Court of Bristol City, Judge Stuart	1
Fifteenth Circuit, Judge Williams	12
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It is probable that a few other cases may be matured before the commencement of the session and added to the docket.

It is to be regretted that the Court will be deprived of the valuable assistance of Judge Harrison in disposing of the business on the docket.

UNIFORMITY OF LEGISLATION AMONG THE SEVERAL STATES.—Under authority of an Act of the last legislature (Acts 1895–96, Ch. 744, p. 825) the Governor has appointed E. W. Saunders of Franklin county, Wm. P. McRae of Petersburg, and J. Alston Cabell of Richmond, a board of commissioners to promote this object. Their duties are prescribed by the Act. However desirable such uniformity on many subjects may be, it is believed that the scheme, for various reasons, is impracticable. A similar board was appointed under an Act of 1894 (Acts 1893–94, Ch. 400, p. 471), but if anything practical was accomplished by it, we haven't heard of it. The legislature has not evinced much faith in the project, as the commissioners are appointed for two years only and receive no compensation except for necessary traveling expenses, not to exceed fifty dollars a year.

JUDGE HARRISON'S ACCIDENT.—We are sure we may assume to speak for the entire bar of the State in tendering their sympathy along with our own to Judge Harrison over the very distressing accident of which he was recently the victim. We have taken pains, just before going to press, to inquire as to his condition. It is gratifying to report that he is as comfortable as is possible under the circumstances, and that his complete recovery is but a matter of time. Both bones of the right leg were broken above the ankle, accompanied by an ugly flesh wound at the point of fracture. The wound has delayed the use of a plaster splint, with the result that the patient will be confined to his bed longer than he would otherwise have been. His attending physician reports that he suffered no shock from the injury, and bears his pains and enforced confinement patiently and cheerfully. His general health is excellent, and his splendid physique and nerve have rendered anodynes and medicines unnecessary from the beginning. It is thought that he will be able to leave his bed in a few days, but that the limb cannot be safely used for probably six weeks. The Judge's chief distress, as might have been expected, has its source in his inability to attend the sittings of the Supreme Court of Appeals, of which he is a most useful member, during its June term at Wytheville.

We hope that Judge Harrison may soon be restored to his place upon the bench, where he has rendered such acceptable service to the profession and to the State, and that out of this ill may come at least a much needed rest.

THE CONSTITUTIONAL PRIVILEGE OF SILENCE—EFFECT THEREON OF STATUTORY IMMUNITY FROM PROSECUTION.—In *Brown v. Walker*, 161 U. S. 591, there is an elaborate examination of this much mooted question by the Supreme Court of the United States, and it is decided that if an Act of Congress affords a witness absolute immunity from prosecution, he cannot refuse to answer a question on the ground of self-incrimination, notwithstanding the declaration of the Fifth Amendmendment to the Constitution of the United States that no person "shall be compelled in any criminal case to be a witness against himself."

The facts of *Brown v. Walker* were as follows:

The appellant, Brown, who was auditor of a railroad, was subpœnaed as a witness before a Federal grand jury to testify as to alleged rebates on freight charges in violation of the Interstate Commerce Act. He refused to answer the questions asked him, on the ground that the answers would tend to accuse and incriminate himself. Persisting in this refusal, he was adjudged to be in contempt and ordered to pay a fine of five dollars, and to be taken into custody until he should answer. This ruling of the District Court was sustained by the Circuit Court; whereupon Brown appealed to the Supreme Court of the United States.

For the appellee, Walker, the marshal to whose custody Brown was remanded, it was contended by ex-Senator George F. Edmunds that the case was controlled by the Act of Congress of February 11, 1893, c. 83, 27 Stat. 443, which enacts as follows: "No person shall be excused from attending and testifying, or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpœna of the Commission, ... on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him

to a penalty or forfeiture. But no person shall be prosecuted, or subjected to any penalty or forfeiture, for or on account of any transaction, matter, or thing, concerning which he may testify or produce evidence, documentary or otherwise, before the said Commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

For the appellant, it it was contended by Mr. James C. Carter that the above Act of Congress was unconstitutional, null and void, as incompatible with the clause of the Fifth Amendment above quoted.

On this question the Supreme Court divided as evenly as was possible, sustaining the constitutionality of the Act of Congress by a majority of one. The opinion of the court was delivered by Mr. Justice Brown, concurred in by Chief Justice Fuller, and by Justices Harlan, Brewer, and Peckham. A dissenting opinion was delivered by Mr. Justice Shiras, in which concurred Justices Gray and White. Mr. Justice Field delivered a separate dissenting opinion.

It is unfortunate that so many questions of importance are decided by the Supreme Court of the United States with a dissent so numerous and weighty that, considering the readiness of the court to reopen and reverse its own rulings, nothing can be considered as settled thereby, except for the time and occasion only. And in *Brown v. Walker*, after reading the arguments *pro* and *con*, one feels that nothing is set at rest by the "high debate," and that the question will inevitably be reopened.

In the dissenting opinion of Shiras, J., it is remarked: "It may not be said that by no form of enactment can Congress supply an adequate substitute [*i. e.*, for the constitutional privilege of silence]; but doubtfulness of its entire sufficiency, uncertainty of its meaning and effect, will be fatal defects." It is then contended that the Act of Congress does not afford an adequate substitute, as the witness is still liable to be prosecuted, *i. e.*, indicted and brought to trial, though the statute gives him a good plea in bar if he is able to sustain it by proof; that the witness is liable to punishment for perjury if he gives false testimony; and that he remains liable to prosecution in the State courts for matters which may be elicited by his testimony.

In his dissenting opinion, Field, J., goes still further, holding that the Fifth Amendment not only protects the witness from prosecution, but also from "all compulsory testimony which would expose him to infamy and disgrace, though the facts disclosed might not lead to a criminal prosecution. It is contended, indeed, that it was not the object of the constitutional safeguard to protect the witness against infamy and disgrace. It is urged that its sole purpose was to protect him against incriminating testimony with reference to the offence under prosecution. But I do not agree that such limited protection was all that was secured. As stated by counsel of the appellant, 'it is entirely possible, and certainly not impossible, that the framers of the Constitution reasoned that in bestowing upon witnesses in criminal cases the privilege of silence when in danger of self-incrimination, they would at the same time save him, *in all such cases* from the shame and infamy of confessing disgraceful crimes, and thus preserve to him some measure of self-respect.'"

Mr. Justice Field also argues that the Act of Congress is void because "it under-

takes, in effect, to grant a pardon in certain cases to offenders against the law; that is, on condition that they will give full answers to certain interrogatories propounded. It declares that the alleged offender shall not be punished for his offence upon his compliance with a certain condition. The legal exemption of an individual from the punishment which the law prescribes for the crime he has committed is a pardon by whatever name the act may be termed. And a pardon is an act of grace, which is, so far as relates to offences against the United States, the sole prerogative of the President to grant."

In the opinion of the court Mr. Justice Brown considers all of these objections to the constitutionality of the Act of Congress, and pronounces them untenable. It is conceded not to be sufficient for a statute to provide merely that the testimony given by a witness should never be used against him in any criminal prosecution (see *Counselman v. Hitchcock*, 142 U. S. 547), but it is held to be otherwise when a statute secures to a witness absolute immunity from prosecution—in other words, if his testimony operates as a complete pardon for the offence to which it relates. And it is held that the Act of Congress of February 11, 1893, is of this character, being virtually an act of general amnesty; and that, although the Constitution vests in the President power to grant reprieves and pardons, this power has never been held to take from Congress the power to pass acts of general amnesty, and is ordinarily exercised in the case of individuals after conviction.

As to the immunity from prosecution afforded the witness by the statute, the court holds that it is absolute, denying that the witness remains liable to prosecution in a State court, but declaring that if this were otherwise, the possibility is too remote to be taken into consideration. And it is added: "The same answer may be made to the suggestion that the witness is imperfectly protected by reason of the fact that he may still be prosecuted, and put to the annoyance and expense of pleading his immunity by way of confession and avoidance. This is a detriment which the law does not recognize. There is a possibility hat any citizen, however innocent, may be subjected to a civil or criminal prosecution, and put to the expense of defending himself; but unless such prosecution be malicious, he is remediless, except so far as a recovery of costs may partially indemnify him. He may even be convicted of a crime, and suffer imprisonment or other punishment before his innocence is discovered, but that gives him no claim to indemnity against the State, or even against the prosecutor, if the action of the latter was taken in good faith, and in a reasonable belief that he was justified in so doing."

In answer to Mr. Justice Field's argument that the statute does not protect the witness from shame and infamy, the court says: "It is entirely true that the statute does not purport, nor is it possible for any statute, to shield the witness from the personal disgrace or opprobrium attaching to the exposure of his crime; but, as we have already observed, the authorities are numerous and very nearly uniform to the effect, that if the proposed testimony is material to the issue on trial, the fact that the testimony may tend to degrade the witness in public estimation, does not exempt him from the duty of disclosure. . . . . The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him from being compelled to furnish evidence to convict him of a criminal charge. If he secure legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable that he should be compelled to pay for the public good. If it be once conceded that the fact that his testimony may tend

to bring the witness into disrepute, though not to incriminate him, does not entitle him to the privilege of silence, it necessarily follows that if it also tends to incriminate, but at the same time operates as a pardon for the offence, the fact that the disgrace remains no more entitles him to immunity [*i. e.*, from testifying,] in this case than in the other."

In support of the decision cases are cited from New Hampshire, Texas, Tennessee (but there a later decision is the other way), Indiana and New York; and also the Virginia case of *Kendrick v. Com.*, 78 Va. 490, where it was held that when a statute secures to a witness, called to testify concerning unlawful gaming, immunity from prosecution for any offence committed by him at the time and place indicated, he is bound to testify, notwithstanding his answer may tend to disgrace him. From this decision two judges (Lacy and Richardson, JJ.) dissented, and the question can hardly be considered as settled in Virginia.

In the conclusion of his dissenting opinion, Mr. Justice Shiras, says: "It is worthy of observation that opposite views of the validity of this provision [*i. e.*, of the Act of Congress of February 11, 1893,] have been expressed in the only two cases in which the question has arisen in the Circuit Court—one in the case of *United States v. James*, 60 Fed. R. 257, where the Act was held void; the other, the present case. In most of the cases cited, where State courts have passed upon analogous questions, and have upheld the sufficiency of a statute dispensing with the constitutional immunity, there have been dissenting judges." And in *Brown v. Walker*, the Judges of the Supreme Court do not even agree upon the canon of construction applicable, the majority invoking the ordinary rule that an Act of Congress is not to be held invalid unless "the opposition between the Constitution and the law be such that the judge feels a clear and strong conviction of their incompatibility with each other;" while the minority declare that "where the courts are confronted with an explicit and unambiguous provision of the Constitution, and it is proposed to avoid, or modify, or alter the same by a legislative act, it is their plain duty to enforce the constitutional provision, unless it is clear that such legislative act does not infringe it in letter or spirit." Viewing the question at issue from such different standpoints, it is perhaps not surprising, considering also its extreme delicacy and difficulty, that the Justices of the Supreme Court reached different conclusions.

PARTIALLY SECURED CREDITORS.—The R. I. Supreme Court in *Greene v. Jackson*, 30 A. 963, hold that an assignment for benefit of creditors, where the dividend paid in addition to the amount recovered by a creditor from collaterals is not sufficient to pay the claim in full, the amount of the collaterals should not be deducted before proving the claim. This holding seeks justification under the rule as established in that State by *Allen v. Danielson*, 15 R. I. 480, which overrules the case of *Re Knowles*, 13 R. I. 90, where the same court allowed a creditor under an assignment, who was secured, and who, after the presentation of her claim, had converted and applied her security, to share with the other creditors only to the extent of her unpaid residue. This is in full accord with the long-established rule in bankruptcy both in England and in this country, that secured creditors shall have dividends only on the residue of their claims after converting and applying the security, or after deducting its agreed or appraised value. This rule is grounded in equity and common sense. Yet the Rhode Island court deems it necessary in

Allen v. Danielson, to apologize for its ruling in *Re Knowles*, seeking excuse for its mistake (?) in the fact that the case was submitted without full argument or *presentation of authorities*, which, supplemented by the prepossession of the court in favor of the rule in bankruptcy, and its desire to avoid diversity of rules, leads one to believe that there were two lines of decision, of about equal authority, to choose between. Later having had brought to its notice a greater array of decisions holding against the rule in bankruptcy, the court, not from principle, but from the weight (!) of authority, reverses its former action and adopts what it calls the sounder rule. There is no pretense on the part of the court to give any other reason for its departure from its first and better ruling than that so many other courts had so decided. Thus we have aerial stairway decisions, by professional courtesy termed "an unbroken line of authorities." One court pronounces a *dictum*, another learns of it, adopts and applies it, a third advised of the "authorities" accepts them unquestioned, and thus it goes on step by step, and "the law" is builded. The Rhode Island court, however, while repudiating its own ruling in *Re Knowles*, is constrained to admit that that case is not without a respectable support. A study of *Amohy v Francis*, 16 Mass. 308; *Farnum v. Boutelle*, 13 Metc. 159; *Wurtz v. Hart*. 13 Iowa, 515; *Midgely v. Slocomb*, 32 How. Pr. 423, and *Third National Bank of Baltimore v. Lanahan*, 66 Md. 461, is convincing not only of the "respectability," but of the righteous correctness of that support — *Chicago Law Journal Weekly.*

The disability of the creditor with a collateral security to prove for his whole debt does not seem to be so clear as our esteemed contemporary assumes. The reverse of its view is held in a recent well-considered case, in which high authority is avouched: *People v. Remington*, 121 N. Y. 328, 334–5–6, decided in 1890; *Third Nat. B'k v. Haug*, 82 Mich. 607.

This reminds us to point out, however, that where two or more separate assignments have been made (*e. g.* by a maker and indorser) to secure the same debt, no part of which has been paid, the creditor is entitled to prove for the full amount against each several fund, and he will be allowed dividends on the basis of the full amount from each, the only limit being full payment. This doctrine was laid down by Lord Hardwicke so early as 1750; *Ex Parte Wildman*, 1 Atk. 109.

We are not aware that this has since been questioned. *Citizens Bank v. Kendrick* (Tenn.), 36 Am. St. R. 96, 98, and *ca. ci.* Consult also in *Re Meyer* (Wis.), 23 Am. St. R. 435, where there is a display of citations for the same proposition, many of them, however, not in point. See also *Miller's Estate*, 82 Pa. St. 113 (22 Am. Rep. 754).

Of course, if the collaterals and the dividends together will more than satisfy the debt, a court of equity, under the doctrine of marshalling of securities, will compel the creditor holding the collateral to exhaust that first, or will let in the other creditors on the collateral after the creditor holding it is satisfied. This presumes that the collateral belongs to the debtor, and that there are no superior equities against it, as of sureties by subrogation, etc. Securities will not be marshalled to the prejudice of the creditor having recourse against the double fund, nor to the injury of third persons.

It seems to us that this distinction between the case where the two funds are more than sufficient to satisfy the creditor, and the case where they are not, should

afford an easy solution of the question, and will reconcile some of the apparently conflicting decisions. The subject of marshalling of securities is discussed at length in Story's Equity Jurisp., secs. 633–643.

EIGHTH ANNUAL MEETING OF THE VIRGINIA STATE BAR ASSOCIATION.—We condense from the programme kindly sent us by Mr. Eugene C. Massie, Secretary, the following account of the proceedings of the next meeting of the Virginia State Bar Association:

The eighth annual meeting of the Association will be held at the Hygeia Hotel, Old Point Comfort, Va., on Tuesday, Wednesday and Thursday, July 14th, 15th and 16th, 1896. Tuesday morning—Call to order by the Chairman of the Executive Committee, Judge Wm. J. Leake, of Richmond; the President's Address, by Robert M. Hughes, Esq., of Norfolk. Tuesday evening.—A paper by Mr. A. R. Long, of Lynchburg, entitled "Constitutional Changes in Virginia." Wednesday morning.—The Annual Address, by Judge U. M. Rose, of Little Rock, Arkansas. Subject: "The Present State of the Law." Thursday morning.—A paper by Hon. W. W. Henry, of Richmond. Subject: "The Evolution of a Bill of Rights and its Place in a System of Free Government."

It is stated that the time appointed for the "John B. Minor Memorial Exercises" will be announced hereafter. For the action taken by the last meeting of the Association on this subject, see 1 Va. Law Reg. 379.

It is a subject of congratulation that the annual address will be delivered by so eminent a lawyer as Judge Rose, of Arkansas. Judge Rose has twice had the honor of reading papers before the American Bar Association, in 1882 on "Titles of Statutes," and in 1893 on "Trusts and Strikes;" and we are sure that his address before the Virginia State Bar Association will sustain his high reputation.

SECTION OF LEGAL EDUCATION OF THE AMERICAN BAR ASSOCIATION.—We are indebted to George M. Sharp, Esq., Secretary, for the following programme of the next annual meeting of the Section of Legal Education of the American Bar Association, to be held at Saratoga Springs, N. Y., August 19th, 20th, and 21st, in connection with the meeting of the American Bar Association: Wednesday, August 19th, 1896, 3 o'clock P. M.—Chairman's Address, Chancellor Emlin McClain, of the State University of Iowa, "The Law Curriculum: Subjects to be Included and Order of Presentation"; Professor Charles M. Campbell, of the University of Colorado, "The Necessity and Importance of the Study of Common Law Procedure in Legal Education", Professor Blewett Lee, of the Northwestern University, "Teaching Practice in Law Schools." Thursday, August 20th, 3 o'clock P. M.—Honorable J. Randolph Tucker, of Washington and Lee University, "Best Training for the American Bar of the Future"; Professor James F. Colby, of Dartmouth College, "The Collegiate Study of Law"; Professor George H. Emmott (Barrister at Law), of the Johns Hopkins University, "Legal Education in England." Friday, August 21st, 3 o'clock P. M.—Austen G. Fox, Esq., of the New York State Board of Law Examiners, "Two Years' Experience of the New York State Board of Law Examiners"; Major J. W. Powell, Director of the Bureau of American Ethnology, Smithsonian Institute, "On the Study of Primitive Institutions."

The objects of the Section are "the discussion of the best methods of legal instruction, both in Colleges and Law Schools, improvements and extensions in the courses of study, and generally the promotion of the interests of legal education."